APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of SEPTEMBER , One Thousand Nine hundred and Eight-two.

PRESENT: HON. WALTER R. MANSFIELD,
Circuit Judge
HON. ELLSWORTH A. VAN
GRAAFEILAND, Circuit Judge
HON. JON. O. NEWMAN,
Circuit Judge

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UNITED STATED OF AMERICA,

Plaintiff-Appellee

v.

MELVIN COOPER,

Defendant-Appellant.

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Melvin Cooper appeals from an order of the United States District Court for the Southern District of New York,

Sand. J., which denied appellant's Rule 35 motion for reduction of his sentence. Appellant contends that reduction was required because the parole board had re-evaluated the severity rating of his offenses subsequent to his sentencing so as to substantially extend the parole relase guidelines believed to be applicable at the time of sentencing.

The district court reviewed the entire record in the light of the increased offense severity guidelines and concluded that the reasons which prompted the sentence "continue to be operative and. . . determinative." Finding no error, we affirm. Se: United States v. Slutsky, 514 F.2d 1222 (2d Cir.

1975); Dioguardi v. United States, 587 F.2d 572 (2d Cir. 1978).

/s/

Hon.Walter R. Mansfield

/s/

Hon.Ellsworth A. Van Graafeiland

/s/

Hon. Jon O. Newman

Circuit Judges

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of November, one thousand nine hundred and eighty-two.

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No. 82-1057

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

MELVIN COOPER, PETER GEOGHEGAN, MICHAEL CARROLL,

Defendants,

MELVIN COOPER,

Defendant-Appellant.

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A petition for rehearing containing a suggestion that the action be reheard

in banc having been filed herein by counsel for the defendant-appellant Melvin Cooper, pro se.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by:

/s/
Francis X. Gindhart
Chief Deputy Clerk

APPENDIX B

A-118

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 CRIM 0015 (LBS)
OPINION #52725

UNITED STATES OF AMERICA,

-against-

MELVIN COOPER, et al.,

Defendant.

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APPEARANCES: (See last page)

SAND, J.

Melvin Cooper's motion for reduction of senteence under Rule 35 is presently before the Court. For the reasons set forth herein, the motion is denied.

On April 10, 1981, after considering the presentence report of the probation department, the Government's

sentencing memorandum, the extensive submissions of the defendant and after a detailed allocution of the defendant, the Court imposed sentences on the four counts to which the defendant pled guilty. These sentences were consecutive and the total term was six years, a fine of $20,000 (committed) and the two year mandatory special parole term.

At the time of sentencing, the Court had before it a presentence report which stated that the "Estimated Parole Release Guidelines" indicated an "Offense Severity Rating" of "Very High" and a "Parole Release Guideline Period" of 24 to 36 months.

Immediately after imposition of sentence, defendant's counsel requested that the sentence be imposed under § 4205(b)(2) and the Court responded

(Tr. 47):

> "I leave the question of parole to the Parole Commission in application of its usual criteria, which I have taken into consideration in the sentence I have imposed."
>
> The following colloquy then took place:
>
> "Mr. Katz: I would like to ask you Honor to make a determination as to parole with respect to sixty days, so when I come back before the Court for a reduction of sentence under Rule 35, your Honor will know what the Parole Board guidelines are.
>
> Mr. Sudler: We know that already.
>
> Mr. Katz: I have spoken to Probation. That is subject to change. They are not bound by the twenty-four to thirty-six month guideline that we presently have.
>
> The Court: I really thing that the Court should not, absent compelling circumstances, deal with the operation of the Parole Commission."

Tr. 47-48.

On April 16, 1981, this matter was again addressed on the return of an order to show cause procured by the defendant.

Counsel for Mr. Cooper stated:

> "My understanding from what your Honor stated is, you want the Parole Board to have complete discretion as to when Mr. Cooper should come up for parole and when he should be released.
>
> The Court: I want them to follow their normal procedures. What I meant to indicate, and I have not had the benefit of seeing that transcript, I did not see any reason to indicate to the Parole authorities that the Court had any view or opinion to cause it to deal with Mr. Cooper in any manner other than that which it normally follows."

Later in these proceedings, the following colloquy took place in connection with defendant's counsel's continued urging that a sentence be imposed which would enable Cooper's

release on parole prior to service of one-third of his sentence, i.e., under § 4205(b)(2):

> "Mr. Katz: Yes; that it will be solely up to the discretion of the Parole Board when he will be released.
>
> The Court: I think as I also said at the time of initial sentencing, the sentence which I have imposed is a sentence imposed in awareness of the usual guidelines and the usual procedures. I see no reason why the Parole Board should regard Mr. Cooper as being immediately eligible for Parole."

Tr. 55.

The event which most immediately precipitates this motion is that the Parole Commission, after reviewing Cooper's case, issued the following Notice of Action:

> "Your offense behavior has been rated as Greatest I severity because your instant offense behavior involved coercion

(employing minor female) to cause at least one woman to perform acts of prostitution. Your salient factor score (SFS-81) is 10 (see attached). You have been in custody a total of 6 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 40-52 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted. As required by law, you have also been scheduled for a statutory interim hearing during April 1983."

Cooper objects to this procedure on a number of grounds. First, he alleges that the Court imposed sentence with an explicit awareness of the guidelines established for the defendant and that the subsequent upward revision of these guidelines is in effect a Parole Commission resentencing. Second, he urges that the reason stated for the

increase in his offense severity rating "(coercion (employing minor female))" is not an offense to which he pled guilty, that the minor involved is unkown to him and that he had no role in the hiring of the prostitutes employed at the several brothels he owned and operated. Finally, he urges that the sentence imposed is disparate to sentences generally imposed in prostitution cases and disparate to the sentences imposed on alleged organized crime figures. The Government had sought Cooper's cooperation in the prosecution of these persons alleged to have engaged in extortion from brothels and his refusal to cooperate was cited by the Government at the time of sentencing.

The Government strenuously resists the motion and urges that this Court

should not sit in review of the Parole Commission's action. The Government notes that Cooper has not pursued his administrative right to appeal the action of the Parole Commission. Finally, the Government urges that the sentence imposed was an appropriate one which has had salutory deterrent consequences, was warranted in the light of Cooper's offenses and was not disparate (noting that special consideration set forth in sealed documents were factors in the sentence to which Cooper refers).

We perceive this motion to be directed entirely to the Court's discretion. There is no question that the sentence imposed was lawful and that the action taken by the Parole Commission was within its power. Numerous decisions uphold the lawfulness of these precedures.

The matter of the alleged coercion of the minor was not a newly injected extraneous consideration. The Assistant United States Attorney made pointed reference to the allegation at the time of sentencing. The charge is not one which, in this Court's view, qualitatively alters the nature of the charges against Cooper (unlike, for example, a charge that a single car theft was part of an organized crime ring).

We will not engage in the argument concerning whether this Court would be reviewing the decision of the Parole Commission or whether the Parole Commission, in essence, served as a reviser of this Court's sentence. Nor, most emphatically, will we engage in a defense of the present sentencing and parole procedures. The alleged deficiencies

in logic and equity of the present practices are now before the Congress as they have been for some time.

Rather, what we have done is to review the entire record from the time of the entry of the plea to sentencing de novo in the light of the increased offense severity guidelines and all of the factors now know to the Court (including especially the urgent pleas of Dr. Goldberg).

The reasons which impelled our initial sentence continue to be operative and, in our view, determinative. The magnitude, duration and destructiveness of Cooper's activities are fully set forth in the record. His efforts to condone his conduct and cast himself in the role of a beneficient protector of his prostitutes is a pathetic romanticization of his actions.

If the sentence imposed is not in line with those normally imposed in routine state prosecutions for prostitution, the short answer is that this Court did not, and does not perceive this to be such a case but rather one involving serious, widespread and prolonged criminality.

Mr. Cooper persists in viewing himself as the victim rather than the victimizer and the time has long past for him to come to grips with reality. The Court feels compassion for his family who suffer perhaps even more severely than Cooper himself from his incarceration. They too are victims. We have considered, as noted, the medical reports which have been submitted. On balance, we nevertheless

feel constrained to adhere to our previous sentence and hope that when Mr. Cooper is released and returned to him family, he will be able to lead a useful and productive life.

Motion denied.

SO ORDERED.

Dated: New York, New York
February 5, 1982

/s/
U.S.D.J.

## Appendix C

### Rule 35 Correction or Reduction of Sentence

(a) Correction of Sentence -
The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence -
The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.